Supreme Court, U.S.
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No. 06-1124

IN THE

Supreme Court of the United States

TEODORO TOLEDO,

Petitioner,

versus

ALPHONSO JACKSON, SECRETARY, U.S. DEPARTMENT OF HUD,

Respondent.

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is summary judgment appropriate in a discrimination case where there are questions regarding the qualifications of competing candidates for a position?

2. How is the term pretext to be defined in a merit system framework?

3. Must criteria used to evaluate individuals for promotion in a merit system for hire be published and must they be demonstrated to relate to the job in question?

PARTIES TO THE PROCEEDING

The Petitioner is Teodoro Toledo.

The Respondent is Alphonso Jackson, Secretary, U.S. Department of HUD.

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OPINIONS BELOW

The opinion sought to be reviewed is that of the Sixth Circuit Court of Appeals in Teodoro Toledo vs. Alphonso Jackson, Secretary, U. S. Department of HUD, 2006 (Sixth Circuit Court No. 05-6938), entered November 20, 2006. The decision of the Trial Court is not officially reported.

JURISDICTION

This is a case arising under the Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. and the Age Discrimination in Employment Act 29 U.S.C. 633(a) et seq.

The Notice of Appeal was filed December 8, 2005.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States of America and 28 USC §2101.

STATUTE

The primary statutes involved in this case are the Age Discrimination in Employment Act, 29 USC §633(a) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq.

STATEMENT OF THE CASE

A. Overview

1. The United States Department of Housing and Urban Development posted an invitation for employees to bid for the position of Supervisory Public Housing Revitalization Specialist. Mr. Toledo, the Appellant, is an Hispanic and native of the Philippines and at the time of his application was 56 years of age. Mr. Toledo was not selected for the position. Another applicant, Steven Schneller was awarded the position. Mr. Schneller is a white mail and is younger than Mr. Toledo. Mr. Schneller seemed to not meet the criteria for the job in that he did not have experience in public housing. Further, the reasons given by the Agency

for promoting Mr. Toledo rather than Mr. Schneller appears to be pretext. One of the two reasons given by the Agency for promoting Mr. Schneller over Mr. Toledo was that Mr Schneller had an excellent academic background. Academic background was not included in any of the qualifications listed for the job. Further, Mr. Toledo has an educational background that is at least equal to and Mr. Toledo believes better than that of Mr. Schneller. The Agency admitted in its brief that Mr. Toledo had met the requirements of a prima facie case of both age discrimination and national origin discrimination. The only issue before the court are the issue as to whether the Agency had a good substantial business reason for its decision to promote Mr. Schneller rather Mr. Toledo and whether that reason was pretext.

B. Facts

1. Plaintiff, Teodoro ("Ted") Toledo applied for the position of Supervisory Public Housing Revitalization Specialist for the Department of Housing and Urban Development ("HUD") in Louisville, Kentucky.

2. Mr. Toledo is an Hispanic and a native of the Philippines. At the time of his application he was 56 years of age.

3. The independent EEO investigator in this case stated in her report of investigation that she could not get a fix on the location where the ratings and rankings were conducted nor could she get an explanation as to why the selected applicant, Schneller, was determined qualified since he was lacking in the major duties of the job announcement.

4. The allegations by the Agency that the reviewing panel determined that Steven Schneller, along with a small group of other applicants, met the minimum qualifications for the position relies on the declaration of Art Wasson which was challenged above.

5. The selected applicant, Schneller, did not have experience in public housing and Section 8 where he admits that Schneller had lack of public housing (PH) knowledge).

6. Discriminating officials, Clem and Wasson, had direct supervisory and working relationships with Mr. Toledo.

7. The Agency's statement that Mr. Toledo's claim of discrimination is predicated on his conclusion that the recipient of the position was not qualified for the job. Mr. Toledo's opinion was echoed and supported by the independent investigator and is supported by evidence as set out herein.

8. Schneller's alleged experience in related community development or local housing programs were not in fact related experience.

9. No members of upper management at the Louisville HUD office are minorities.

ARGUMENT

Mr. Toledo has demonstrated that his non-selection was motivated by discriminatory intend and that the reasons given for his non-selection were pretext.

A Plaintiff may establish a prima facie case of retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3, by proving:

> (1) that Plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his . . . civil rights was known by the Defendant; (3) that, thereafter, the Defendant took an employment action adverse to the Plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Christopher v. *Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir.), cert. denied, 502 U.S. 1013 (1991); *Lacy* v. *Bentsen*, 859 F.Supp. 1039, 1042-43 (E.D. Mich.

1993), aff'd, 25 F.3d 1049 (6th Cir. 1994); *Bacon* v. *Secretary of the Air Force*, 785 F.Supp. 1255, 1264-65 (S.D. Ohio 1991), aff'd, 7 F.3d 232 (6th Cir. 1993), cert. denied, 119 S.Ct. 1568 (1994).

This analysis is applicable to the ADEA, which at 29 U.S.C. § 623(d), prohibits private employers from discrimination against individuals for assisting in an ADEA proceeding. *Hollis* v. *Fleetguard, Inc.*, 668 F.Supp. 631, 637 (M.D. Tenn. 1987), aff'd, 848 F.2d 191 (6th Cir. 1988). The EEOC, which at 29 U.S.C. § 633a(b), is given authority to issue regulations to enforce the prohibition against discrimination in federal employment, prohibits, at 29 C.F.R. § 1614.101(b) (994), federal employers from retaliation for participating in administrative proceedings under the Title VII. The cases alleging retaliation under Section 1614.101(b) have adopted the Title VII analysis of the burden of proof. *Parnell* v. *Stone*, 793 F.Supp. 742, 746 (E.D. Mich. 1992), aff'd, 12 F.3d 213 (6th Cir. 1993).

A. The District Court Erred In Granting Summary Judgment

The Plaintiff has three (3) basis (not one) for this action.

1. The Agency discriminated in the hearing process when the hiring officials, Clem and Wasson claim that they relied upon the job interviews of Mr. Toledo and Mr. Schneller and that Mr. Toledo was not forceful in his job interview.
2. The Agency discriminated against Plaintiff by its failure to reject Mr. Schneller because he was unqualified for the position.
3. Management (Mr. Wasson) has stated that one of the reasons that Mr. Schneller was selected was that he had an excellent academic background. Academic background was not any of the QRF's for the

> job. Further, Mr. Toledo has a Bachelor of Arts Degree in Business Administration and an MBA in management. He has served as an instructor in Management Technology at Jefferson Community College. His education and experience in the academic community exceeds that of Schneller.

Any of these incidents of discrimination is sufficient for the Plaintiff to prevail in his claim of discrimination.

The Agency has not argued against the impropriety of the lack of objective standards or of any other standards in the job interviewing process but chose only to argue against the second issue above.

The Agency admits in its Memorandum in Support of Motion for Summary Judgment in the District Court that Plaintiff has met the standards for a prima facie case in both his claim of age discrimination and his claim of national origin discrimination. Pursuant to the case of *McDonnell Douglas Corp. vs. Green*, 411 U. S. 792, 802 (1973) and *Texas Dep't of Community Affairs vs. Burdine*, 450 U.S. 248, 253 (1981), once the Plaintiff has demonstrated a prima facie case, the Agency may demonstrate that it had a good substantial business reason for its actions in not promoting Plaintiff. Should the Agency demonstrate a good substantial reason for its action, the Plaintiff may demonstrate that said actions were merely pretext. In this case, the Agency alleges that it had a good substantial business reason for its decision not to promote Mr. Toledo, that being that Mr. Wasson made the subjective decision that Mr. Toledo did not interview as forcefully as the selected candidates. The criteria for said selection are purely subjective. There were no objective criteria relied upon by Mr. Wasson in his decision. The subjectivity of the decision creates a question of material fact for the jury to determine.

In fact, Mr. Toledo interviewed no worse than Mr. Schneller. The only independent reviews of the interviewers was that of the independent EEO investigator who stated that there was no discernable difference between the interviewed of Schneller and Toledo. This creates a question of fact for the jury. Further, in relation to the issue of communication and forcefulness, Clem and Wasson were both cognizant of Mr. Toledo's experiences and communication skills as they related to his "detail" to Memphis.

Further, Mr. Toledo's communications skills were rated as outstanding by his supervisors.

Finally, Mr. Toledo's teaching at the college level indicates that his communications skills are very good.

The statements of Wasson and Clem that the job was given to Schneller rather than Toledo because Schneller performed better in the interview and communicated better are obviously pretext.

The subjective decision of Mr. Wasson in choosing a younger Caucasian male over a more qualified Hispanic/ Pacific Islander, older male using only subjective criteria which are refuted by the record creates a question of fact for the jury. It is highly likely that Mr. Wasson's claim that Mr. Toledo did not interview forcefully is simply his way of saying that Mr. Toledo spoke with an accent.

The Agency alleges that Mr. Toledo has no evidence that the off-sight panel for the on-sight decision makers were motivated by discriminatory animus. Assuming arguendo that a decision was made with regard to an off-sight panel, that does not abdicate the decision of Mr. Wasson in his choice of an unqualified candidate over Mr. Toledo. In fact, Mr Toledo was apparently given a score of 60.0 by the investigative panel and Mr. Schneller was given a score of only 28.5. The EEO investigator commented in

her report of investigation that she could not get a fix on the location where the rating and ranking was conducted nor could she get an explanation of why Schneller was determined as qualified since he was lacking in the major duties of the job announcement. The Plaintiff did not draft the job announcement subject of this action. Agency, HUD drafted the job announcement subject of this action.

The selected candidate did not have experience in public housing or Section 8 programs and as such was unqualified for the position since those experiences in these activities were mandatory requirements for the job.

Experience in public housing and Section 8 housing is a mandatory requirement for the job in question. While the job announcement may be somewhat ambiguous regarding this matter, the HUD job analysis form cited above contains no such ambiguity.

The Trial Court indicated that the job requirements were different depending on whether the job was graded "13" or "14". In this case, the job was bid in one job announcement at both "13" and "14". Since Mr. Toledo was deemed qualified at the "14" level, he obviously had superior qualifications to perform the job if it was awarded at a "13" level.

Further, Mr. Wasson was aware of Mr. Schneller's inability to meet this mandatory job requirement as indicated in his e-mail to EEO investigator Bonds wherein he states, "... to me programmatic experience was not as important as supervisory experience." Inasmuch as Mr. Wasson was aware of Mr. Schneller's failure to satisfy a mandatory experience function, he cannot "hide his head in the sand" and blame an opposite panel.

If knowledge and/or experience in public housing, Section 8 programs was not a job requirement, it should not have been listed in the knowledge, skills and abilities required for the job.

If Mr. Schneller's experience falls into the category of "related community development or housing programs," the selecting officials should describe how it is related and what related programs would meet the requirement.

Mr. Toledo contends that Mr. Schneller's experience is not related and that Mr. Schneller did not possess the technical expertise necessary for the performance of the job.

B. The Case Herein Is Not Appropriate For Summary Judgment

Mr. Toledo met his burden of proving a prima facie case of national origin and age discrimination. The question then becomes first whether the Agency has demonstrated a legitimate purpose in its decision not to promote Mr. Toledo and second whether that reason is pretextural.

The role of the judge in summary judgment is not to waive the evidence but to determine whether these is genuine issue of material fact for trial. *See*: *Talley* v. *Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241 (6th Cir., 1995) credibility determinations weighing of evidence and drawing of legitimate inferences and facts are those of the jury, not the judge. All justified inferences are to be drawn in favor of the non-moving party. (*See*: *Morales* v. *American Honda Motor Co.*, 71 F.3d 531 (6th Cir., 1995); *Agrister Fin. Corp.* v. *Van Sicle*, 967 F.2d 233 (6th Cir., 1992); *United States* v. *O'Black*, 788 F.2d 1433, 1435 (10th Cir., 1986).

It is the job of the court to determine whether there is a genuine issue of material fact. The Court should determine whether there is sufficient evidence favoring the non-Movant for a finder of fact to return a verdict in that party's favor. *See*: *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Turner and Bosseau* v. *Nationwide Mutual Insurance Co.*, 989 F.Supp. 1359 (D.Kan 1997). It is not up to the Court on a summary judgment motion to determine which side is likely

to win. (In the case before the Court they were fact questions regarding the qualifications of the individual awarded the job as compared to those of Toledo. There were material questions and inferences to be drawn regarding the announced changes to the job requirement. All of these inferences should be drawn in favor of Toledo.

Whereas here there is a question as to the qualifications of a candidate for a job summary judgment may not be appropriate. (*See*: *Kline* v. *TVA*, 128 F.3d 337 (6th Cir., 1997)

REASONS FOR GRANTING THE WRIT

This case should be reviewed because it will further help define the term pretext pursuant to *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 802 (1973) and *St. Mary's Home Center* v. *Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 2749 (1993). Pretext should be explained within the Merit System framework, where there are rigid rules regarding job announcements. There are few, if any definitive cases relating to the merit system framework. The definitions of pretext have not been well defined in this area.

Within the merit system framework can an unannounced change in criteria, developed after the selecting official views the applications demonstrate pretext?

Respectfully Submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-6938

TEODORO TOLEDO - - - - *Plaintiff-Appellant*

v.

ALPHONSO JACKSON, SECRETARY, UNITES STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - - - - - - *Defendant-Appellee*

On Appeal from the United States District Court for the Western District of Kentucky

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Before: CLAY, ROGERS, Circuit Judges; KATZ, District Court Judge.*

Rogers, Circuit Judge: Teodoro Toledo's employment discrimination claims against the United States Department of Housing and Urban Development falter two-thirds of the way through the three-part *McDonnell Douglas* analysis. *See McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). Toledo, a Hispanic/Pacific Islander born in 1947, established a *prima facie* case of both age and national origin discrimination against HUD, which hired Stephen Schneller, a younger Caucasian American male, as "Supervisory Public Housing Revitalization Specialist" instead of promoting Toledo to that position. *See Anthony* v. *BTR Automotive Sealing Sys. Inc.,* 339 F.3d 506, 515 (6th Cir. 2003); *Grosjean* v. *First Energy Corp.,* 349 F.3d 332, 338-40 (6th Cir. 2003). HUD then articulated a legitimate, non-discriminatory reason for its

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*The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

decision to hire Schneller, namely that Scbneller interviewed better and had better academic credentials than Toledo. *See Cox* v. *Ky. Dep't of Trans.*, 53 F.3d 146, 150 (6th Cir. 1995). Because Toledo offered no evidence to suggest that HUD's proffered reason was pretextual, his discrimination claims fail to satisfy the third *McDonnell Douglas* element. For this reason, we AFFIRM the district court's decision to grant HUD's motion for summary judgment and dismiss Toledo's claims.[1]

Toledo, a Hispanic native of the Phillippines, was approximately 56 years old when he applied for a position as a Supervisory Public Housing Revitalization Specialist with HUD in Louisville. The job posting required candidates to have "[k]nowledge and/or experience in public housing, Section 8 programs, or related community development or local housing programs."[2]

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[1] This court reviews the district court decision to grant summary judgment *de novo*. *Rowley* v. *United States*, 76 F.3d 796, 799 (6th Cir. 1999). Summary judgment is appropriate if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

[2] The posting read:

> **KNOWLEDGES** [sic], **SKILLS AND ABILITIES REQUIRED**
>
> Quality Ranking Factors: Applicants MUST provide separate narrative statements describing how their experience satisfies each Quality Ranking Factor (QRF)/Knowledge, Skill and Ability (KSA). Provide specific examples of your qualifications and significant accomplishments.
>
> 1. Ability to direct and manage a staff (Critical Factor)
> 2. Ability to establish objectives and performance goals, monitor progress toward their achievement and set priorities based on changing requirements.
> 3. Ability to communicate effectively and perform representational functions both orally and in writing with HUD clients, local government officials, citizen groups and/or the public on programmatic and technical issues.
> 4. Knowledge and/or experience in public housing, Section 8 programs, or related community development or local housing programs.

(JA 76-77.)

An offsite, three-person panel reviewed the applications that Toledo, Stephen Schneller, and other applicants submitted and concluded that Toledo, Schneller, and a small group of applicants satisfied the minimum qualifications for the position. At that point, Art Wasson, the Director of the Office of Public Housing, and Don Clem independently reviewed the applications and interviewed candidates. Wasson and Clem agreed to hire Schneller, who exhibited positive qualities and interviewed better than Toledo.

On February 20, 2004, Toledo alleged in a four-page complaint that HUD violated the Age Discrimination in Employment Act, 29 U.S.C. § 633(a), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when it hired "an individual less qualified than [Toledo] and not of the same protected class as [Toledo] based on age and national origin." On July 1, 2005, HUD moved for summary judgment, which the U.S. District Court for the Western District of Kentucky granted on November 14, 2005. For his ADEA and Title VII claims to survive summary judgment, Toledo must show that there exists a material issue of fact as to whether (1) HUD's proffered reason had no basis in fact, (2) the proffered reason did not actually motivate HUD, or (3) the proffered reason was insufficient to motivate the decision to hire Schneller over Toledo. *See BTR Automotive Sealing Sys., Inc.*, 339 F.3d at 516.

Because Toledo concedes that he has no direct evidence of discriminatory intent, he instead argues, first, that the language of the vacancy announcement demonstrates that Schneller was not qualified, and, second, that Schneller did not, in fact, interview better than Toledo and did not have as good of an academic background as Toledo.

The terms of the vacancy announcement do not support Toledo's claim. Toledo cites the posting's requirement that applicants have "[k)nowledge and/or experience in public housing, Section 8 programs, or related community development or local housing programs" and argues that Schneller lacked knowledge of or experience in "public housing" and

"Section 8 programs."[3] Toledo's reading of the vacancy announcement is flawed, as he implicitly recognized during his deposition. Public housing and Section 8 experience is not a necessary pre-requisite for the job since a qualified applicant can have knowledge or experience in related community development or local housing programs" instead. Indeed, Schneller had such skills. At the time of his application for the position, Schneller was an Operations Specialist-Community Builder for HUD. From 1996 to June 2000, he was the Housing Development Manager for Volunteers of America of Kentucky and Tennessee, Inc., and from June 1993 to October 1996, he served as the Executive Director of Community Health Trust, Inc. For this reason, there is no material issue of disputed fact whether HUD's proffered decision was pretextual.

Also unavailing is Toledo's second argument that he interviewed as well as Schneller and that his academic background is stronger. It may very well be that Toledo is more qualified than Schneller and that HUD incorrectly thought otherwise. Such a fact, however, is irrelevant. The ADEA and Title VII prohibit employers from discriminating against applicants on the basis of protected characteristics; these laws do not require employers to hire the best applicants. *See Stein* v. *Nat'l City Bank*, 942 F.2d 1062, 1065 (6th Cir. 1991); *Wrenn* v. *Gould*, 808 F.2d 493, 502 (6th Cir. 1987). Toledo's presentation of his own qualifications and his mere conclusory allegations as to pretext are insufficient to withstand a motion for summary judgment. *McDonald* v. *Union Camp Corp.*, 898 F.2d 1155, 1162(6th Cir. 1990); *BTR Auto-*

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[3] An undated "Memorandum for Record" from Loretta L. Bonds, "Contract Investigator, JDG Associates, Inc." notes that Bonds could not "get an answer [from HUD] as to how the selectee was rated qualified as he had no experience in the major duties as listed in the vacancy announcement." (JA 120.) Contrary to Toledo's description, Bonds merely purports to ask HUD about Schneller's qualifications; she does not make any conclusions about them.

motive Sealing Sys., Inc., 339 F.3d at 516; *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960, 964 (6th Cir. 1989).[4]

For the foregoing reasons, the district court judgment is AFFIRMED.

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[4] Toledo failed to present any evidence that his interviewing skills and academic credentials were so far superior to those of Schneller that the disparity in abilities alone could warrant a jury finding that HUD's reasons for hiring Schneller were pretext.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:04CV-121-S

TEODORO TOLEDO - - - - - - - *Plaintiff*

v.

ALPHONSO JACKSON, SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - - - - - - - - - *Defendant*

MEMORANDUM OPINION

This matter is before the court on motion of the defendant, Alphonso R. Jackson, Secretary of the U.S. Department of Housig and Urban Development ("HUD"), for summary judgment in this action alleging discrimination on the basis of age and national origin in HUD's hiring practices.

The plaintiff, Teodoro Toledo, sought but was not selected for promotion to the position of Supervisory Public Housing Revitalization Specialist (hereinafter "the position") in HUD's Louisville District. Toledo is a Hispanic native of the Phillippines. He was fifly-six years old when he applied for the position.

Stephen Schneller, a 40-year-old Caucasian American male, was awarded the position identified as "Supervisory Public Housing Revitalization Specialist, 1101, Grade 13" on the Certificate of Eligibles. Plaintiff's Exhibit A ("Ex. A"), ex. 28, pg. 1. There is a second Certificate of Eligibles for the position of "Supervisory Public Housing Revitalization Specialist, 1101, Grade 14" which does not contain Schneller's name. Ex. A, ex. 28, pg. 3.

The position for which Toledo applied was advertised in a vacancy announcement publisbed on August 7, 2002. The

position was described in the announcement as a GS-1101-13/14 position with a salary range of $64,542.00-$99,150.00 per year. The announcement contained the following specific information:

> MAJOR DUTIES:
>
> The incumbent is responsible for supporting the Office Director in the implementation of all Public Housing programs including the Section 8 Housing Choice Voucher and Moderate Rehabilitation Programs; Capital Fund Programs (HOPE 6, development and modernization), Management Assessment Programs (for instance PHAS and SEMAP); Operatig Fund program and resident self-sufficiency and economic independence programs.
>
> QUALIFICATIONS REQUIRED:
>
> Applicant must have one year of specialized experience equivalent to the next lower grade in the Federal service, which has equipped the applicant with the particular knowledge, skills, and abilities to successfully perform the duties of the position. Experience is typically in or related to the work of the position as described in the Major Duties above.
>
> Specialized experience includes performing management practices and procedures; organizational operations and practices of corporate or other organizations and experience in Muman Resources Management.
>
> KNOWLEDGES [sic], SKILLS, AND ABILITIES REQUIRED
>
> Quality Ranking Factors: Applicant MUST provide separate narrative statements describing tiow their experience satisfies each Quality Ranking Factor (QRF)/Knowledge, Skill and Ability (KSA). Provide specific examples of your qualifications and significant accomplishments.
>
> 1. Ability to direct and manage a staff. (Critical Factor)
>
> 2. Ability to establish objectives and performance goals, monitor progress toward their achievement and set priorities based on changing requirements.

3. Ability to communicate effectively and perform representational functions both orally and in writing with HUD clients, local government officials, citizens groups and/or the public on programmatic and technical issues.

4. Knowledge and/or experience in public housing, Section 8 programs, or related community development or local housing programs.

Ex. A, ex. 12, pg. 2.

Toledo, Schneller, and a number of other applicants were found to be qualified and their names were submitted for final consideration. They were interviewed, and Schneller was ultimately selected for the position. Toledo filed an EEO complaint alleging discrimination based on his national origin and his age. Ex. A, ex. 1. In his explanation of the specific actions resulting in his allegations (Ex. A, ex. 1, ¶ 16) he contended that the Schneller had no experience in public housing or Section 8 programs and was less qualified than Toledo. He stated more specifically in his response to HUD's motion for summary judgment that (1) he was discriminated against in the hearing process when the decisionmakers relied upon the candidate interviews and determined that Toledo was not forceful and did not interview well, (2) that he was discriminated against by HUD's failure to reject Schneller as unqualified for the position, and (3) he was discriminated against when Schneller's academic credentials were considered insofar as academic background was not a Quality Ranking Factor to be considered for the position. Response Brief, pgs. 4-5.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes* v. *S.H. Kress & Co.*, 393 U.S. 144, 151-60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix* v. *Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct.

2505, 2510 (1936). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bnank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

In its motion, HUD admits that Toledo has made a *prima facie* case of discriminatory nonselection/non-promotion. Memorandum in Support, pg. 7. The legally significant age difference between Schneller and Toledo satisfies the requirement for a *prima facie* case of age discrimination in spite of the fact that Schneller is also a member of the protected age class. *Grosjean* v. *First Energy Corp.*, 349 F.3d 332 (6th Cir. 2003). Further, HUD acknowledges that Toledo is a member of a recognized protected national origin class and thus has made a *prima facie* case of national origin discrimination. Memorandum in Support, pg. 8.

Upon proofs of a *prima facie* case, the burden of proceeding with evidence shifts to the defendant to articulate some legitimate, non-discriminatory reason for its decision. *Wrenn* v. *Gould*, 808 F.2d 493, 501 (6th Cir. 1987), *quoting*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The ultimate burden of proving that the HUD intentionally discriminated against him remains with Toledo at all times. Once a legitimate, nondiscriminatory reason for the decision is articulated, Toledo must demonstrate by a preponderance of the evidence that the proffered reason was pretextual in order to defeat summary judgment. *See*, *Wrenn*, 808 F.2d at 501 and cases cited therein. "To establish that the explanation is pretextual, 'the plaintiff is required to show by a preponderance of the evidence either

(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [the defendant's action], or (3) that they were insufficient to motivate the [action].' *Manzer*, 29 F.3d at 1084..." *Whitaker* v. *Wallace*, 170 F.3d 541, 544 (6th Cir. 1999).

Toledo attempts to show that the proffered reason for his non-selection was a pretext because in fact Schneller was not a qualified applicant. Toledo contends that experience in public housing and Title 8 programs was a mandatory requirement for the job. The sole piece of evidence he offers in support of this contention is a HUD Job Analysis Form, Ex.A, ex. 28, pg. 49. Memorandum in Response, pg. 7. He has offered no evidence that the decisionmakers reviewed or utilized this form in formulating the vacancy announcement or in evaluating the qualifications of the candidates. Additionally, Toledo has no evidence that this form was considered and its contents disregarded in order to qualify an otherwise unqualified individual or individuals.

In any event, it does not appear that the particular HUD Job Analysis Form to which he cites applies to the position for which Schneller was hired. The vacancy announcement described the position as a GS-1101-13/14 with a salary range from $64,542.00 to $99,150.00 per year. Schneller was hired as a GS-1101-13. Ex. A, ex. 14, pg. 4. The Job Analysis Form to which Toledo referred was for the higher rank of GS-1101-14. The form indicates that knowledge and experience in public and/or assisted housing programs, as more particularly described, is mandatory for the grade 14 position. The HUD Job Analysis Form found at Ex. A, ex. 28, pg. 51, however, applies to the position of GS-1101-13 for which Schneller was hired. By contrast, this form does not state that knowledge and experience in public and/or assisted housing programs is mandatory. The HUD handbook on merit staffing describes the development of job analyses and the compilation of HUD Job Analysis Forms. In pertinent part, it states that

> Those KSAs [knowledge, skills and abilities] which are mandatory for successful job performance are

> marked with an "M" on the HUD Job Analysis Form. These are selective placement factors (SPFs) and consist of those KSAs which must be brought to the position, i.e., cannot be learned on the job in a timely manner...The KSAs which are not mandatory for successful job performance but are desirable characteristics and contribute to outstanding job performance are called quality ranking factors (QRFs). These KSAs are used to distinguish various levels ofquality among candidates who demonstrate possession of all of the mandatory KSAs (selective placement factors). Any factor on the HUD Job Analysis Form which is not designated as mandatory (ie. is not marked with an "M") is a quality ranking factor.

Ex. A, ex. 28, pg. 29. By the very documents submitted by Toledo in Ex. A, it is established that there is a distinction in the qualifications required for the ranks of GS-1101-13 and GS-1101-14. The vacancy announcement reflects that either level of experience may qualily applicants for the position. Thus Toledo has not shown that Schneller was unqualified for the position of GS-1101-13 for which he was hired.

In light of the fact that Schneller was found to be a qualified applicant, and Toledo has come forward with no evidence to call this fact into question, Toledo's remaining two bases for his claims of discrimination must also fail. "This court does not sit as a super-personnel department that reexamines an entity's business decisions...The question is not whether the [employer] exercised prudent business judgment...but whether [the plaintiff] has come forward to refute the articulated, legitimate reason for the [employment decision]...The [employee's] perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant." *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986).

The decisionmakners' determination that Toledo did not interview well has been characterized by Toledo as poor business judgment, but it simply cannot be shown to be "an error too obvious to be unintentional." *Fischbach* v. *D.C. Department of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir.

1996), *citing, Ramey* v. *Bowsher,* 915 F.2d 731 (D.C. Cir. 1990). "Employers have the discretion to choose among qualified candidates, 'provided that the decision is not based upon unlawful criteria.' " *Ramey,* 915 F.2d at 735, *quoting, Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 259, 101 S.Ct. 1089, 1097, 67 L.Ed.2d 207 (1981). Toledo has offered no evidence to suggest a discriminatory animus in the decisionmakers' selection of Schneller from the pool of qualified candidates. "An employer has even greater flexibility in choosing a management-level employee...because of the nature of such a position." *Wrenn,* 808 F.2d at 502, *citing, Ackennan* v. *Diamond Shamrock Corp.,* 670 F.2d 66, 70 (6th Cir. 1982), *et al.*

The court concludes that no genuine issue of material fact exists and HUD is entitled to judgment as a matter of law. A separate order will be entered this date in accordance with this opinion.

November 14, 2005

/s/ C R Simpson
Charles R. Simpson III, Judge
United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:04CV-121-S

TEODORO TOLEDO - - - - - - *Plaintiff*

v.

ALPHONSO JACKSON, SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - - - - - - - - - - *Defendant*

ORDER

Motion having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the defendant, Alphonso R. Jackson, Secretary, U.S. Department of Housing and Urban Development, for summary judgment (DN 15) is **GRANTED** and this action is **DISMISSED WITH PREJUDICE**. There being no just reason for delay in its entry, this is a final order.

November 14, 2005

/s/ C R Simpson
Charles R. Simpson III, Judge
United States District Court

APPENDIX C

[EXCERPTS FROM 28 USC §2101]

TIME FOR APPEAL—S.C.T.

28 § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under Section 1253 of this title, holding unconstitutional in whole or in part, by Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(**b**) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of the district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within thirty days if final.

(**c**) Any other appeal or any writ of certiorari intended to bring any judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(**d**) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(**e**) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(**f**) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the

court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(**g**) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98-209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100-352, § 102 Stat. 663.)

EQUAL EMPLOYMENT OPPORTUNITIES

42 § 2000e. Definitions

For the purposes of this subchapter—

(**a**) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(**b**) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be en-gaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];

(2) although is not certified, is a national or international labor organization or a local labor organization or a local labor board organization recognized or acting as the representative of employees of an employer

or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points of the same State but not through a point outside thereof.

(**h**) The term "industry affecting commerce" means any activity, business, or industry in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(**i**) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.]

(**j**) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(**k**) The terms "because of sex" or "on the basis of sex include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(**l**) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(**m**) The term "demonstrates" means meets the burdens of production and persuasion.

(**n**) The term "respondent" means an employer, employment agency, labor organization, joint-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

(Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679; Pub.L. 102-166, Title I, §§ 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

EQUAL EMPLOYMENT OPPORTUNITIES

42 § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(**1**) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(**2**) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because if such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an uniawful employment practice for an employment agency to fall or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an uniawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify

or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.]

(g) National security

Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position,

or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employee to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentages imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or i the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; and

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an

alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process as one employment practice.

(ii) if the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense action against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provisions of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (21 U.S.C.A. § 801 et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1) (A) Notwithstanding any other provisions of law, except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties in the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102-166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

AGE DISCRIMINATION

29 § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this sections may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such actio. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub.L. 90-202, § 15, as added Pub.L. 93-259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74, and amended Pub.L. 95-256, §5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No.1, eff. Jan. 1, 1979, § 2, 43 F.R. 19807, 92 Stat. 3781.)